UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM W. ADAMS, of Millinocket, County of Penobscot, et al., all of the State of Maine,	)	
Plaintiffs	)	
v.	)	Civil No. 00-12-B-C
BOWATER INCORPORATED, and BOWATER INCORPORATED PENSION PLAN FOR CERTAIN EMPLOYEES OF GREAT NORTHERN PAPER, INC., and DOES 1 THROUGH 20, all doing business in the State of Maine,	)	
Defendants	)	

RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, employees of Great Northern Paper, asserted four counts against Bowater Incorporated, the former owner of GNP, and the Bowater Incorporated Pension Plan for Certain Employees of Great Northern Paper, Inc. for an alleged violation of ERISA § 204(g) and breach of fiduciary duties. Before me for recommended decision are plaintiffs' motion for summary judgment (Docket No. 94) and defendants' motion for summary judgment (Docket No. 91) on Counts II and III of plaintiffs' second amended complaint. (Docket No. 37.) Plaintiffs' only other claims, Count I and IV, have previously been dismissed. (Docket Nos. 29 & 89.) I recommend that the Court **GRANT** defendants' motion for summary judgment and **DISMISS** Counts II and III as **MOOT** and **DENY** plaintiffs' motion for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter at law." Fed. R. Civ. P. 56(c). A fact is "material" when it has the "potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A "genuine issue" exists when the evidence is "sufficient to support rational resolution of the point in favor of either party." Id. To determine whether genuine issues of material fact exist in matters subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment. Cont'l Grain Co. v. P.R. Mar. Shipping Auth., 972 F.2d 426, 429 (1st Cir. 1992). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts

Count II and III plaintiffs consist of ten employees of Great Northern Paper ("GNP") who are participants in the Bowater Incorporated Pension Plan for Certain Employees of Great Northern Paper, Inc. ("Plan") that provides a "subsidized" early retirement benefit. (Pls.' Statement of Material Facts (PSMF) ¶¶ 1, 13, 15.) The Plan, sponsored by Bowater Incorporated ("Bowater") (Id. ¶ 5), originally allowed GNP employee-participants to choose among various options for early retirement which, across the continuum, consist of the 55/15 Option, the 55/28 Option, the 55/29 Option,

the 55/30 Option, and the 60/30 Option.[1] (Defs.' Statement of Material Facts (DSMF) ¶ 5.) A participant who elects a higher Option (i.e. 55/30 and 60/30) receives a greater monthly benefit than a participant who elects a lower Option (i.e. 55/15 and 55/28). (Id.)

When Bowater sold GNP by transfer of ownership stock in 1999 (PSMF ¶ 5), Bowater adopted a 1999 Amendment which stated the following: "Participants shall not receive additional credit for Continuous Service on account of employment with the Employer [i.e. GNP] ... from and after the Closing Date." (Id. ¶ 11, Ex. H at 5.) On January 24, 2000, plaintiffs initiated this action alleging in Count I that the 1999 Amendment violated ERISA § 204(g) (Docket No. 1 ¶ 35), which prohibits employers from reducing or eliminating certain early retirement benefits.[2] See 29 U.S.C. § 1054(g). Plaintiffs claim that as a result of certain misrepresentations made by defendants, the Count II plaintiffs, Cannon, McAlister, Melanson, and Trueworthy, elected and received early retirement pension benefits under either the 55/28 or the 55/29 Option available to them under the Plan. (PSMF ¶ 13; DSMF ¶ 8.) The Count III plaintiffs, Boynton, Carter, Crawford, Farrar, Pennington, and Shepperd, Jr., had less than twenty-eight years of service and elected to receive early retirement benefits under the 55/15 Option. (PSMF ¶ 15.)

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[1] The numbers pertain to the participant's age and years of service, respectively.

[2] ERISA section 204(g), now designated as 29 U.S.C. § 1054(g), in part states:

> Decrease of accrued benefits through amendment of plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

A few months after plaintiffs initiated this action, the Plan Administrator issued a March 2000 administrative determination received by plaintiffs in the form of a "Dear Participant" letter. (DSMF ¶ 10; PSMF ¶ 27.) The Plan Administrator informed participants:

> [T]he Plan, as amended, does not limit the GNP [continuous] service credited toward early retirement eligibility or to be used to determine the early commencement reduction factors. Thus, as long as a participant is employed by Great Northern Paper, Inc. his or her employment will continue to count for purposes of determining (1) whether he or she is eligible for early or optional retirement and (2) his or her applicable early commencement reduction factor.

(PSMF Ex. Z.)

The following month, defendants adopted the April 2000 Amendment which rescinds the disputed 1999 Amendment and thereby formally permits plan participants to receive credit for their continuous service at GNP. (PSMF ¶ 31, Ex. AA.) The 2000 Amendment applies retroactively to the effective date of the 1999 Amendment and includes a preamble that cites the Plan Administrator's determination as the basis for the 2000 Amendment. (PSMF Ex. AA; Defs.' Resp. Pls.' Statement of Material Facts (DRSMF) ¶ 31.) The 2000 Amendment repealed the challenged 1999 Amendment and brought about the recommended dismissal of Count I as moot. Adams v. Bowater, Inc., 2000 WL 1092253 (D. Me. Aug. 2, 2000), aff'd Docket No. 29.

In the remaining counts, Counts II and III, plaintiffs allege that defendants breached their fiduciary duties by misrepresenting plaintiffs' rights to grow into benefits, thereby inducing plaintiffs to elect less favorable benefits. (Docket No. 37 at 8-10.) The alleged misrepresentations include defendants' statements in the summer of 1999 that plaintiffs would have to apply for early pension benefits by October 1999, if they wished

to preserve a portion of the pension they had earned. (Id. at 8.) Plaintiffs further claim that defendants made misrepresentations when they announced the "illegal" 1999 Amendment. (Id. at 9.) Plaintiffs assert that defendants' statements and omissions constitute violations of defendants' duty to accurately explain that employees have a right to receive their entire pension when they grow into the eligibility thresholds. (Id.) Plaintiffs assert that the 2000 Amendment does not undo the harm caused by defendants' actions, namely their forgone rights to elect a more favorable Plan Option after completing additional years of service. Although the parties dispute whether defendants made misrepresentations regarding plaintiffs benefits (PSMF ¶¶ 13, 15; DRSMF ¶¶ 13, 15), they do not dispute that plaintiffs received less valuable benefits than they otherwise would have if they had not made their election.[3] (Id.)

In October 2000, defendants mailed participants an "Important Notice Regarding Supplemental Distributions" ("Notice") which states that plan participants, including those who took or take less favorable retirement options, are eligible to elect the more favorable options and receive supplemental distributions upon reaching the various thresholds described in the Plan as age and years of service requirements. (PSMF ¶ 34.) Defendants subsequently filed a motion for summary judgment asserting that in light of the Notice, Counts II and III were moot. (Docket No. 40.) However, in a decision dated May 11, 2001, I recommended that the motion be denied because the Notice, without a plan amendment or court order, did not provide plaintiffs with certainty regarding their

[3] However, the plaintiffs' own expert agrees that the June 2001 Amendment that is the subject of this motion will indeed provide these particular plaintiffs with complete relief when they reach their eligibility for supplemental benefits. See Adams v. Bowater, Inc., 2001 WL 506873, *2-3 (D. Me. May 11, 2001), aff'd. Docket No. 90. Plaintiffs have no dissatisfaction with the adequacy of their relief if the current amendment is implemented.

entitlement to future relief of their alleged harm. Adams v. Bowater, Inc., 2001 WL 506873 (D. Me. May 11, 2001), aff'd. Docket No. 90.

Soon thereafter, defendants adopted the June 15, 2001 Conforming Amendment, which allows certain plan participants to receive supplemental distributions upon reaching each threshold (i.e. 55/28, 55/29, 55/30, and 60/30). (PSMF ¶ 36, Ex. EE.) The Conforming Amendment, in relevant part, states:

> WHEREAS, the Plan Administrator has issued a determination under the Plan regarding additional distributions to employees of GNP who receive a distribution of their benefit after the sale of GNP by the Company, but continues to receive credit for Continuous Service as provided under the Plan, and
>
> WHEREAS, the Company [Bowater, Inc.] desires to amend the Plan to conform the Plan to that determination;
>
> NOW, THEREFORE, the Company hereby amends the Plan, effective as of August 17, 1999, by adding the following Section 7.6 (and by renumbering the remaining sections contained in Section 7 of the Plan accordingly):
>
> "7.6 Supplemental Distributions. Any Participant who receives a prior distribution of his benefit from the Plan...in connection with a Termination of Employment occurring on or after the Closing Date, and who continues to receive Continuous Service on account of employment with the Employer [GNP] to the extent described in the first sentence of Section 1.12(e),[4] may become eligible to receive one or more supplemental distributions under the Plan as described in this Section 7.6.
>
> (a) Such a Participant shall be eligible to apply for a supplemental distribution upon each of the following: (i) his Early Retirement Date, (ii) attainment of age 55 and completion of 28 years of Continuous Service, (iii) attainment of age 55 and completion of 29 years of Continuous Service, and (iv) attainment of age 55 and completion of 30 years of Continuous Service, and (v) if the Participant is in active employment with the Employer, attainment of age 60 and completion of 30 years of Continuous service. Such a Participant may apply for a supplemental distribution at any time after he satisfies any of the foregoing age and Continuous Service requirements until the time he

[4] Section 1.12(e) defines Credit Service to include an affiliated employer or predecessor employer that maintains the plan.

> satisfies another of such requirements. Only one application may be submitted by a Participant with respect to the satisfaction of each of the foregoing requirements.
>
> (b) If such a Participant is entitled to and applies for a supplemental distribution, the Plan shall calculate an incremental benefit payable to the Participant commencing on a date elected by the Participant for distribution of such benefit, as follows... .
>
> (c) A Participant entitled to receive a supplemental distribution for attainment of events described in clauses (i) through (iv) of paragraph (a) may choose to commence such distribution at any time after becoming eligible for such distribution, provided that in no case shall such distribution commence later than the Participant's Normal Retirement Date. If the Participant commences receipt of such supplemental distribution before his Normal Retirement Date the amount of the supplemental distribution shall be reduced in accordance with section 7.3. Such supplemental distributions may be distributed in any form available to such Participant under the Plan, and shall be otherwise subject to the terms of the Plan. Notwithstanding the foregoing, the temporary supplemental benefit available to a Participant upon attainment of the event described in clause (v) of paragraph (a) shall be distributed at the times provided under the terms of the Supplement that covers the Participant, and may be distributed in a lump sum only if provided under the Supplement that covers the Participant."

(PSMF Ex. EE.)

On July 13, 2001, defendants filed a motion for summary judgment (Docket No. 91) asserting that plaintiffs' Counts II and III fail as moot because the 2001 Conforming Amendment provides plaintiffs with their only remedy available under ERISA: to be made whole as if the 1999 Amendment never occurred. (Defs.' Mot. Summ. J. (DMSJ) at 4-5.) On the same date, plaintiffs filed a motion for summary judgment (Docket No. 94) seeking a declaration from the court that defendants' 1999 Amendment violated ERISA § 204(g) and a ruling that defendants misinformed plaintiffs regarding their rights to "grow into" their benefits after the sale of GNP (Pls.' Mot. Summ. J. (PMSJ) at 20), thereby inducing plaintiffs to apply for and receive less favorable benefits than they

otherwise would have. Plaintiffs also seek a judicial order incorporating defendants' 2000 and 2001 Amendments, minus certain language. (Id.)

Discussion

To conclude that a matter is moot, I must find that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). A claim is deemed moot if the defendant has demonstrated that "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Knight v. Mills, 836 F.2d 659, 670-671 (1st Cir. 1987) (citing Davis, 440 U.S. at 631) (internal citations and quotations omitted).

I. Whether Defendants Have Demonstrated There is No Reasonable Expectation that the Alleged Violation Will Recur

In asserting that the matter is moot, defendants have a heavy burden of demonstrating that "'there is no reasonable expectation that the alleged violation will recur.'" Nunez-Soto v. Alvarado, 956 F.2d 1, 3 (1st Cir. 1992) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). The "alleged violations" in Count II and III are breaches of fiduciary duty arising from alleged misrepresentations by defendants regarding plaintiffs' ability to grow into their benefits. (Docket No. 37 at 8-10.) Plaintiffs allege that defendants' misrepresentation induced them to elect less favorable retirement options thereby forgoing more favorable options as they grow into higher eligibility thresholds. (Id.)

Defendants argue that since the March 2000 Plan Administrator's determination, defendants have always intended for plaintiffs to be entitled to grow into their benefits at

higher thresholds and receive supplemental distributions at each threshold. (DMSJ at 3, 5.) This assertion is supported by defendants' October 2000 Notice and the June 2001 Conforming Amendment, which state that plaintiffs and similarly situated individuals who selected early retirement benefits due to the sale of GNP and who provide continuous service with GNP are eligible for supplemental distributions as they reach each eligibility threshold. (DSMF ¶¶ 12, 13; PSMF Ex. BB and Ex. EE.) Although defendants' 2000 Notice alone is not sufficient to provide plaintiffs with certainty regarding their entitlement to future relief because the Plan Administrator's determination is always subject to the actual language of the Plan, the formalization of defendants' position in the 2001 Conforming Amendment provides plaintiffs with certainty. (See Adams, 2001 WL 506873 at *4; DSMF ¶ 13.) Via the 2001 Conforming Amendment, coupled with the Plan Administrator's unwavering position during the past year that plaintiffs are entitled to receive supplemental distributions at each threshold, defendants have demonstrated that there is no "reasonable expectation" the alleged conduct (i.e. a breach of fiduciary duty involving misrepresentations regarding plaintiffs' ability to "grow into" future benefits) will recur.

However, plaintiffs argue that defendants have not met their burden. (PMSJ at 17-19.) Plaintiffs claim that defendants' history during the past two years is "one of continuing violation of ERISA section 204(g)... ." (Id. at 13.) They assert that defendants refuse to admit that their adoption of the 1999 Amendment was a violation of § 204(g). They further argue that defendants' 2001 Conforming Amendment can be "unilaterally" withdrawn, amended and interpreted by defendants, therefore it does not secure their rights under ERISA § 204(g). (Id.) For these reasons, plaintiffs insist that

there is a reasonable expectation that the plan will be amended again and urge that a court order is needed to ensure their entitlement to the supplemental distributions provided in the 2001 Conforming Amendment. (Id. at 20.) Their argument is not based upon anything the Plan Administrator has said or done, but rather on their speculative fear induced by defendants' litigation posture of refusing to admit that the 1999 Amendment was a violation of § 204 (g).

Plaintiffs' argument is not persuasive for two reasons. First, they attempt to persuade the Court that defendants have engaged in a course of conduct which demonstrates that defendants will again amend the Plan, this time eliminating the supplemental benefits. In making this argument, plaintiffs are attempting to bootstrap the dismissed Count I allegation that defendants violated ERISA § 204 (g). However, the "alleged violations" in Counts II and III are not violations of § 204 (g), but are breaches of fiduciary duty arising from alleged misrepresentations regarding plaintiffs' rights to grow into future benefits. (Docket No. 37 at 8-10.); See Clarke v. United States, 915 F.2d 699, 703 (D.C. Cir. 1990) ("...where plaintiffs are resisting a mootness claim we think they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief."). Second, as defendants' alleged misrepresentations occurred in the context of defendants' 1999 Plan Amendment to eliminate continuous service credit when defendants sold GNP, and that amendment has since been withdrawn, there is no realistic threat that without court supervision, defendants would again make such representations. Like the expectation previously expressed when arguing that Count I was not moot, plaintiffs' "reasonable expectation" that the claimed fiduciary breach in Counts II and III is likely to recur, is based upon generalized distrust of defendants'

motives not upon the specific conduct before the court in this case. It therefore follows that plaintiffs' assertion that defendants may someday amend or interpret the Plan in a manner which results in the denial of plaintiffs' benefits is speculative. See Paciello v. UNUM Life Ins. Co., 188 F.R.D. 201, 204 (S.D.N.Y. 1999) ("Plaintiff's speculation that her benefits might be withdrawn in the future, and that she might then receive a defective denial of benefits letter, does not mean that she has a live case in controversy at this moment.").

Plaintiffs' remaining arguments, that defendants included a "self-serving" preamble in the 2001 Conforming Amendment and delayed in adopting the 2001 Amendment (PMSJ at 13, 19), does not indicate a reasonable expectation that a misrepresentation would recur. First, the preamble directly expresses defendants' desire to ensure that plaintiffs and similarly situated individuals are entitled to additional distributions under the Plan. Second, the language of the Amendment clearly specifies who is entitled to receive supplemental distributions. Third, plaintiffs' entitlement to the supplemental distributions under the 2001 Conforming Amendment does not hinge on the basis for which the Amendment was adopted or the time frame in which the amendment was adopted.

Based on the above analysis, I conclude that defendants have met their burden of demonstrating that there is no reasonable expectation that the violations alleged in Counts II and III are likely to recur.

II. Whether Defendants Have Demonstrated That They Have Completely and Irrevocably Eradicated the Effects of the Alleged Violation

The alleged "effect" of defendants' actions is plaintiffs' foregone future ability to elect and receive payments for more favorable retirement options. Plaintiffs ultimately

seek to be placed in the same position they would have been in had they not elected an unfavorable retirement option. (Docket No. 37 at 12.) Defendants assert that the 2001 Conforming Amendment, as adopted, rectifies plaintiffs' alleged injury because it allows plaintiffs to elect a better retirement option each time an eligibility threshold is crossed. (DMSJ at 4-5.) As each age and years of service threshold is crossed, the participant can elect to receive a supplemental distribution. (DSMF ¶ 13.) Defendants assert that the 2001 Amendment not only makes plaintiffs whole, it places plaintiffs in a better position because plaintiffs received money in 1999 that they otherwise would not have been eligible to receive. (DMSJ at 4-5.) Further, defendants claim that the 2001 Amendment grants plaintiffs the only remedy available to them, to be put in the place of the "*status quo ante*." (Id. at 6.)

Plaintiffs do not and cannot dispute these assertions. Nonetheless, they claim that the 2001 Conforming Amendment does not provide them with an adequate remedy. First, they argue that the Amendment is contrary to what plaintiffs refer to as the "one lump sum only" provision contained in Plan Supplements one through four. (PMSJ at 13; PSMF ¶ 36.) Plaintiffs claim that the one lump sum provision prohibits additional distributions, including those provided under the 2001 Conforming Amendment. Plan Supplements one through four each contain the following provision at issue:

> Lump Sum Benefit Option:
> A Participant, other than a Participant eligible to receive a Disability Benefit under Section 10, may make an election under which the Actuarial Equivalent of this retirement benefit will be paid to him in a single sum. If the Participant is married at the time of the election, his spouse must also sign the application form provided by the Plan Administrator in accordance with the spousal consent requirements of Section 12.
>
> A participant who receives a single sum form of payment shall have all rights extinguished under this Plan and shall not be eligible for any post-

> retirement increases. If the Participant is later reemployed by the Employer, his prior Continuous Service and Credited Service shall be reinstated under the provisions of Sections 7.5(c), 7.7 or 7.8, and any future retirement benefits to which he may become entitled shall be reduced by the Actuarial Equivalent of the single sum he received under this provision. ...

(PSMF Ex. CC.)

Although this provision does not contain the term "one lump sum," the term "single sum" appears. Further, plaintiffs' concern is understandable regarding the first sentence of paragraph two, which states, "A participant who receives a single sum form of payment shall have all rights extinguished under this Plan and shall not be eligible for any post-retirement increases." This language may have been problematic had the recent Conforming Amendment not so clearly provided otherwise.

The 2001 Conforming Amendment specifically provides that certain participants who have "receive[d] a prior distribution" of their benefit may be eligible to receive "one or more supplemental distributions." (PSMF Ex. EE. at 1.) (emphasis added). This language clearly allows more than one lump sum payment. Further, the Amendment expressly applies to "any participant," and does not exclude plan participants who fall under Plan Supplements one through four. (Id.) (emphasis added). The Amendment provides that an employee can elect to apply for supplemental distributions at each eligibility threshold if the employee: (1) is a plan participant (2) who has received a prior distribution of his benefit in connection with a Termination of Employment that occurred on or after the Closing Date, and (3) who continues to receive Continuous Service on account of employment with GNP. (Id.) The language in the 2001 Conforming Amendment clearly states that any participant who meets the criteria is eligible to receive

the supplemental benefits. For these reasons, the 2001 Conforming Amendment is not inconsistent with the lump sum provision in Plan Supplements one through four.

Second, plaintiffs claim that no supplemental benefits have been paid to Count II and Count III plaintiffs. (PMSJ at 19.) However, plaintiffs fail to offer evidence in their statement of facts that any of the plaintiffs applied for supplemental benefits pursuant to the March 2000 Plan Administrator's determination, the October 2000 Notice, or the 2001 Conforming Amendment. Further, there is no evidence that defendants have denied any applicant a supplemental benefit. Thus, plaintiffs' allegation that no supplemental distributions have been paid does not bring a real controversy before the Court.

Third, plaintiffs argue that the 2001 Conforming Amendment is not an adequate remedy without drafting changes. (PMSJ at 20.) Plaintiffs seek the removal of defendants' "self-serving" preamble and corrections regarding fifteen-year rights and multiple lump sum distributions. (Id.) As discussed above, the lump sum provision and the preamble are not issues affecting plaintiffs' entitlement to supplemental distributions. I do not address plaintiffs' correction "regarding 15 year rights" as plaintiffs do not inform the court what correction they seek.

The 2001 Conforming Amendment completely and irrevocably eradicates the effects of the alleged violation, namely the fiduciary's misrepresentation that led plaintiffs to forego the opportunity to elect and receive payments under more favorable Plan Options as they grow into them. That option has been fully reinstated and plaintiffs have been made whole. The 2001 Conforming Amendment is retroactive to August 13, 1999, therefore, it reaches back to the date of plaintiffs' alleged injury. (PSMF Ex. EE.) The Amendment allows plaintiffs to apply for more favorable retirement options as they

become eligible by crossing the age and years of service thresholds. The Conforming Amendment expressly applies to "any participant" and specifically includes plaintiffs because they received a prior benefit distribution in connection with a termination of employment that occurred on or after the closing date and they continued to receive Continuous Service on account of employment with GNP. Finally, the Amendment is not contrary to the Plan Supplements one through four. For these reasons, I conclude that defendants have demonstrated that they have completely and irrevocably eradicated the effects of the alleged violation.

III. Whether the Voluntary Cessation Exception to the Mootness Doctrine is Applicable

Plaintiffs argue that defendants should not be allowed to moot plaintiffs' Counts II and III merely by adopting the 2001 Conforming Amendment. (PMSJ at 17-19.) In making this assertion, plaintiffs rely on the voluntary cessation exception to the mootness doctrine (Id. at 18-19), which strives to "prevent defendants from defeating a plaintiff's effort to have its claims adjudicated simply by stopping their challenged actions, and then resuming their 'old ways' once the case became moot." See Boston Teachers Union, Local 66 v. Edgar, 787 F.2d 12, 16 (1st Cir. 1986) (citing Grant, 345 U.S. at 632)). Although it is well established that voluntary cessation of alleged illegal conduct does not moot a case, a case is nonetheless deemed moot if the defendant has demonstrated that there is no reasonable expectation that the alleged violation will recur and the remedy sought has been provided. See Knight v. Mills, 836 F.2d at 671 (stating that when these two conditions have been met, the case is moot "'because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.'" (quoting Davis, 440 U.S. at 631)). The voluntary cessation exception is really part

and parcel of defendants' heavy burden of demonstrating that there is no reasonable expectation that the alleged violation will recur. It is a fact specific inquiry that first requires the court to determine the nature of the alleged violation. See Clarke, 915 F.2d at 703, (citing to United States v. W.T. Grant Co., 345 U.S. 629, 632, (1953) (voluntary cessation exception rooted in interest in protecting plaintiff from defendant's possible "return to his old ways") and emphasizing that court's first task must be to determine the nature of the wrong alleged).

The present facts are distinguishable from the voluntary cessation cases plaintiffs cite. Here, the facts do not indicate that this is a matter where defendants "stopped" engaging in misrepresentations to thwart the adjudication of plaintiffs' Count II and III claims. Nor do the facts indicate that defendants' "old ways" would result in the denial of plaintiffs' supplemental distributions. During the past year defendants' have demonstrated that they intend for plaintiffs to be entitled to grow into higher eligibility thresholds and receive supplemental distributions. Defendants have not taken any actions contrary to plaintiffs' interest since defendants rectified the Count I alleged violation by enacting the 2000 Amendment. Since defendants undid the 1999 Amendment, defendants' position, that plaintiffs are entitled to supplemental distributions as they grow into the age and service requirements at each threshold, has been consistent and is reflected in the October 2000 Notice and the 2001 Conforming Amendment. Thus, the adoption of the 2001 Conforming Amendment, which provides supplemental distributions, cannot be construed as a "cessation" of the alleged violation (i.e. the breach of fiduciary duty arising from misrepresentations regarding plaintiffs' ability to grow into their benefits). Likewise, defendants' stance that plaintiffs are entitled to grow into more

favorable thresholds and receive supplemental distributions, coupled with the adoption of the 2001 Amendment does not create a fear that there are "old ways" defendants may resume after Counts II and III are dismissed.[5]

For these reasons, I find that the voluntary cessation exception is not applicable in this case. See D.H.L. Associates, Inc. v. O'Gorman, 199 F.3d 50, 55 (1st Cir. 1999) (stating that the voluntary cessation exception only applies "when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case." (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n. 11 (1982)).

3. Summary of Findings

In sum, the 2001 Conforming Amendment provides plaintiffs with the relief they ultimately seek: to be placed in the same position they were in prior to the fiduciary's alleged misrepresentation. I find there is no reasonable expectation that the alleged violation will recur and that the 2001 Conforming Amendment has completely and irrevocably eradicated the effects of the alleged violation and therefore the voluntary cessation exception is not applicable in this matter. For these reasons, Count II and Count III are moot. There is no need to determine whether defendants violated § 204 (g) or breached fiduciary duties because plaintiffs no longer have a "live" interest in such further findings. See Boston Teachers Union, Local 66 v. Edgar, 787 F.2d 12, 16 (1st Cir. 1986) (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)

[5] One case cited by plaintiffs in the portion of their memorandum dealing with the voluntary cessation exception merits mention because the facts are analogous to the present case. In an unpublished opinion the Tenth Circuit overturned the District Court's dismissal of a case based upon mootness. See Jenkins v. Green Bay Packaging, Inc., 39 F.3d 1192 (10th Cir. 1994). That case, however, is distinguishable because it involved an actual denial of pension benefits and then an apparent "change of heart" during the course of lengthy litigation resulting in the payment of those benefits. The court refused to allow the defendants' conduct to defeat plaintiffs' claim for attorneys' fees under § 1132 of ERISA. The court does not refer to the voluntary cessation doctrine at all in its unpublished opinion. In the present case the defendants

(stating that if a case is moot, the court is forbidden by Article III to render an opinion, as it would be a "purely advisory opinion based on hypothetical facts.").

Conclusion

I recommend that the Court **GRANT** defendants' motion for summary judgment and **DISMISS** Counts II and III as **MOOT** and **DENY** plaintiffs' motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 26th day of November, 2001

COMPLX

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-12

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amended the plan to eliminate the perceived § 204 (g) violation before it ever filed an answer and has never denied any plaintiff any pension benefits.

ADAMS, et al v. BOWATER INC, et al Filed: 01/25/00

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 791

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 29:1001 E.R.I.S.A.: Employee Retirement

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